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NO. 84-917

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

BEATRICE M. HANSEN, ET AL,
Petitioners

v.

JOHNS-MANVILLE SALES CORPORATION, ET AL,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' CROSS-PETITION FOR WRIT OF CERTIORARI

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Alpha Law Brief 3003
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QUESTIONS PRESENTED FOR REVIEW

Did the Fifth Circuit err in refusing to require the Income Tax Instruction of Norfolk & Western Railway Co. v. Liepelt, 444 U.S. 490, ____S.Ct.____, ____L.Ed.2d ____, (1980) ("Liepelt") to the present case at Bar which was based upon a State Cause of Action between two private individuals.

Did the Fifth Circuit err in upholding an award of punitive damages in a suit alleging causes of action based upon Strict Liability in Tort, and upon negligence for failure to adequately test and inspect and for failure to warn, when the evidence supported a finding that the acts of manufacturer constituted "gross negligence" as defined by Texas Law, and when there has been no indication by the Texas Courts that punitive damages would be disallowed in such a case.

LIST OF PARTIES

Pursuant to Rule 21.1(b), counsel for Respondents certify that the following is a complete list of all parties:

(1) Beatrice M. Hansen, Respondent.

(2) Johns-Manville Sales Corporation, Cross-Petitioner and Respondent.

(3) Johns-Manville Products Corporation, Cross-Petitioner and Respondent.

(4) The Travelers Insurance Company, Intervenor.

(5) The Charter Oak Fire Insurance Company, Intervenor.

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To The Honorable United States Supreme Court:

COMES NOW Cross-Respondents and, in reply to Cross-Petitioners' Application for Writ of Certiorari seeking Review of the Fifth Circuit's June 11, 1984 Judgment, pray the Writ not Issue and that the same be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 734 F.2d 1036 (5th Cir. 1984) and is attached as Appendix A in the Petition. The Court's Order denying the Motion for Rehearing is attached as Appendix B in the Petition. The Jury Verdict and the Trial Court Judgment are attached as Appendix C and D in the Petition.

JURISDICTION

Cross-Petitioners seek to invoke jurisdiction via 28 U.S.C. Sec. 1254(1). The Fifth Circuit's Judgment was entered on June 11, 1984, and Motions for Rehearing denied on September 12, 1984.

FEDERAL STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment.
United States Constitution, Fourteenth Amendment.

STATEMENT OF THE CASE

ANDREW T. HANSEN, ("Decedent") began working for Todd Shipyards in Galveston, Texas in 1940, as a pipefitter, whereby he would tear out old insulation in ships and install new insulation. During his employment, Decedent worked primarily with products containing asbestos that were manufactured by JOHNS-MANVILLE. Decedent suffered an ankle injury in 1976 and retired.

In 1978, at age 65, Decedent who had been in good health began to develop chest problems. MR. HANSEN was diagnosed as suffering from severe respiratory illnesses, being that of Asbestos-associated diseases, namely, Asbestosis and malignant Mesothelioma. MR. HANSEN

lived for thirteen (13) months thereafter, whereby he was hospitalized five (5) times and had to undergo chemotherapy. MR. HANSEN died on August 5, 1979.

A Jury Trial on Special Interrogatories was had and Judgment in the amount of $2,070,500.00 was entered on May 11, 1982.

JOHNS-MANVILLE sought a Liepelt Income Tax Instruction which the Trial Court refused. Post-Trial Motions were filed by JOHNS-MANVILLE, all of which were denied, and Supersedes Bond was filed and approved.

The Fifth Circuit affirmed the Trial Court refusal to give the Liepelt Instruction and refused to strike punitive damages.

REASONS FOR DENYING CERTIORARI

JOHNS-MANVILLE sets out eight grounds to grant Certiorari:

(1) The Fifth Circuit holds that *Liepelt* is "inapposite" to the case at Bar and limits *Liepelt* to F.E.L.A. cases. This conflicts with *Liepelt's* holding and reasoning, as well as with *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981) ("Gulf Offshore").

(2) The Fifth Circuit conflicts with other Circuits in a wrongful death case based on diversity jurisdiction where the State practice forbids a Liepelt instruction.

(3) The lower court's mis-reading of *Liepelt* and its progeny results in inflated Jury verdicts.

(4) The applicability and scope of the *Liepelt* instruction is an important question of Federal Law which should be settled.

(5) The Fifth Circuit, in approving multiple awards of Punitive damages in Mass Tort Litigation, conflicts with other opinions, within the Fifth Circuit and with other Circuits.

(6) Multiple punitive damage awards in Mass Tort Litigation exceeds the level necessary to punish and deter.

(7) Multiple punitive damage awards in Mass Tort Litigation spells the defeat of the purpose behind Strict Liability and Punitive Damages.

(8) Strict Liability and Punitive damages are inherently compatible.

Cross-Respondent then briefly replies.

Rule 17 notes that Certiorari is granted only where special and important reasons exist. JOHNS-MANVILLE attempts to invoke Rule 17.1(a) (conflicting opinions) and Rule 17.1(c) (important unsettled questions). Cross-Respondents assert that none of JOHNS-MANVILLE'S "reasons" validly apply under Rule 17 Guidelines.

ARGUMENT AND AUTHORITIES
(Points 1 thru 4)

JOHNS-MANVILLE requested that the District Court instruct the Jury that damage awards are not subject to Federal taxation. The District Court refused. JOHNS-MANVILLE asserts that this refusal was error, to which the Fifth Circuit did not agree (A-16 of Petition).

JOHNS-MANVILLE'S reliance upon *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490 (1980), and *Gulf Offshore Co. v. Mobil Oil Corp.,* 628 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), as to the present case at Bar is misplaced. It appears that JOHNS-MANVILLE has taken words and phrases and quotes, out of context, organized in such way as to give the appearance of some bases for its argument. This Honorable Court in *Norfolk & Western Railway Co. v. Liepelt,* supra, concluded as a matter of Federal law, *the Jury in an FELA case must be instructed on request that the damages award is not taxable.* (Emphasis added). Further, as this Court stated, one of the purposes of the Federal Employer's Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibilities for injuries to their employees. *Liepelt,* supra, n. 5; see also, H. R. Rep. No. 1386, 60th Cong., 1st Sess. p. 3 (1908).

JOHNS-MANVILLE also relies heavily on this Court's opinion in *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 101 S.Ct. 2870, 66 L.Ed.2d (1981). As set forth in the opinion, the case required the Supreme Court to determine whether Federal Courts have exclusive jurisdiction over personal injury and indemnity cases arising under the Outer Continental Shelf Lands Act, 67 Stat. 462, as amended, 43 U.S.C. Sec. 1331 et seq. (1976 ed. and Supp. III). It was also considered whether the rule of *Liepelt,* that the Jury be instructed that personal injury damage awards are not subject to Federal Income Taxation, is applicable to such a case.

JOHNS-MANVILLE omits any mention of *Gulf Offshore,* supra, being remanded to the Texas Court of Civil

Appeals for a determination of whether Louisiana Law requires the instruction and, if it does not, whether *Liepelt* displaces the State Rule *in an OCSLA case.* (Emphasis added) (*Gulf Offshore* at p. 2880). Upon remand to the Texas Court of Civil Appeals, it was noted by the Appellate Court that it has been recognized by the Supreme Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), that unless a Federal law is *applicable* to the particular case, the State law is not inconsistent with it. The State Appellate Court further stated:

> "It seems important to this Court that the United States Supreme Court in the instant case saw fit to restate with approval its early statement in *Huson* to the effect that in OCSLA Congress borrowed a remedy provided by State law and thereby 'specifically rejected National Uniformity' as a paramount goal. 101 S.Ct. at 2880."[1]

Thus, for the reasons set forth above, the Texas Appellate Court in *Gulf Offshore* held that the rule announced in *Liepelt* does not displace the State rule in an OCSLA case and thus having decided the questions mandated by the Supreme Court of the United States, the Judgment of the Trial Court was affirmed. *Gulf Offshore,* supra, at p. 175.

As was correctly stated by the Fifth Circuit, the argument of JOHNS-MANVILLE on these issues is entirely misplaced. HANSEN alleged causes of action based upon Strict Liability for the manufacture of the asbestos-containing insulation and upon negligence for failure to ade-

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1. *Gulf Offshore Co. v. Mobil Oil Corp.,* 628 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), at p. 174, 175.

quately test and inspect, and for failure to warn, and the Jury returned answers to Special Interrogatories accordingly. Thus, the present case at Bar involves a matter brought under Texas (State) law, and that law applies to the question whether such an instruction was warranted. *Croce v. Brumley Corp.*, 623 F.2d 1084, 1097 (5th Cir. 1980). It was correctly observed by the Fifth Circuit in *Croce,* supra, that *Liepelt* did not control the decision because the wrongful death action in *Liepelt* arose under the FELA and not under a State statute, and such distinction was crucial. *Croce,* supra at 1096.

It was also correctly observed in *Croce* that it has long been settled that questions concerning the measure of damages in an FELA action are federal in character, however, in the *Croce* case federal concerns were lacking (just as they are lacking in the present case at Bar) as the wrongful death action was a Statutory creation of the State and the measure of damages to be recovered was governed by State law. *Croce,* supra at 1097; see also, n. 32, p. 1094.

The Court in *Croce,* supra, went on to state that:

> "Nor is the need for uniformity throughout the United States, which was 'one of the purposes of the Federal Employers' Liability Act,' id, 100 S.Ct. at 757 n. 5, implicated in a cause of action brought to vindicate a state-created right despite some broad language approving an instruction that informs a Jury that an award of damages will not be subject to income tax, see id. 100 S.Ct. at 759, there is no suggestion that the Supreme Court in *Liepelt* intended to require a Trial Judge to give such an instruction in wrongful death actions predicated upon State statutes."

Croce, supra, at p. 1097.

Texas law explicitly disapproves of such an instruction because it introduces a collateral matter into the damage issue. *Missouri-Kansas-Texas R.R. Co. v. McFerrin,* 291 S.W.2d 931, 945 (Tex. 1956); *Caterpillar Tractor Co. v. Gonzales,* 599 S.W.2d 633 (Tex. Civ. App.—El Paso, 1980, writ ref'd n.r.e.).[1a]

In support of the argument that the Fifth Circuit Decision on this issue conflicts with decisions in other Circuits, JOHNS-MANVILLE refers to the Seventh Circuit case of *In Re Air Crash Disaster Near Chicago,* 701 F.2d 1189 (7th Cir. 1983), and that the rationale set forth therein should apply to all causes of action involving wrongful death and damages which are to be submitted to the Jury. One important distinction however is the fact that the Illinois Supreme Court has never decided whether evidence of the hypothetical tax liability of lost earnings is admissible in wrongful death cases, which is the exact opposite of Texas, whereby this element of "tax instruction" has been firmly established for many years. Another distinction was the fact that Illinois' substantive measure of damages is identical to the FELA measure of damages. *In Re Air Crash Disaster,* at p. 1195, 1199.

In Federal diversity actions the substantive State policies should be followed if it would be unfair to the citizens of the Forum State not to follow them. *Hanna v. Plumer,* 380 U.S. 460, 468 (1965). The Fifth Circuit has held that determining damages in a diversity case is substantive and State law is to be followed. *Budge v. Post,* 643 F.2d 372 (5th Cir. 1981).

Texas Courts have consistently held the impact of Federal income taxation to be immaterial and inadmis-

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1a. See also, *Turner v. General Motors Corp.,* 584 S.W.2d 844, 853 (Tex. 1979).

sible. (*Missouri-Kansas-Texas R.R. Co., v. McFerrin,* supra, *Texas Consol. Transp. Co. v. Eubanks, Turner v. General Motors Corp.,* supra, *Caterpillar Tractor Co., v. Gonzales,* supra.) It is clear that this case is brought under Texas law, and Texas law applies to the question whether such an instruction was warranted, and that the present case at Bar is clearly distinguishable between *Liepelt* (F.E.L.A.) and *Gulf Offshore* (a case brought under Louisiana Substantive Law). Further, it is clear that the question is not one of Federal law and that the District Court properly refused to give the requested instruction, and the Fifth Circuit was correct in affirming the refusal to give a *Liepelt* instrcution.

COUNTER POINTS 5 THROUGH 8

JOHNS-MANVILLE wants this Court to absolve them totally from potential Punitive Damage liability regardless of the nature of their conduct or their present financial condition. The thrust of their argument is the Fifth Circuit Decision which construed Mississippi Substantive Law in the case of *Jackson v. Johns-Manville Sales Corp.,* 727 F.2d 506 (5th Cir. 1984), together with the confessed dicta of Judge Friendly in *Roginsky v. Richardson-Merrell, Inc.,* 378 F.2d 832 (2nd Cir. 1967).

JOHNS-MANVILLE has raised several issues with regard to the Jury's finding of gross negligence and the award of Punitive Damages, including the potential for overkill in the award of Punitive Damages in Mass Products Liability situations as being inconsistent with the underlying policy objectives of both Strict Liability and Punitive Damages. JOHNS-MANVILLE also argues that it has been subjected to repeated awards of Punitive damages, thus unconstitutionally subjecting it to double

jeopardy, and to loss of property without due process of law.

Under Texas law, a Plaintiff is entitled to Punitive Damages upon a showing of gross negligence, i.e., that the Defendant was consciously, knowingly indifferent to the Plaintiff's welfare and safety. *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1374 (5th Cir. 1982). In *Jackson v. Johns-Manville Sales Corp.*, supra, the Fifth Circuit held that Mississippi Substantive Law would disallow Punitive damages in asbestos products liability actions, and for the reasons stated therein, the panel of the Fifth Circuit disallowed the punitive damages awarded, holding that Mississippi Substantive Law would disallow such awards in a similar situation.[2] (See also, A-7 of Petition).

JOHNS-MANVILLE presents similar arguments in the present case at Bar, urging that the very attributes of the Mississippi Law of Strict Liability that prompted the *Jackson* panel to find that Mississippi Law would disallow punitive damages in this type of case are present in Texas law as well. Thus, JOHNS-MANVILLE argues that this Honorable Court should follow the panel's decision in *Jackson.*

Article 16, Sec. 26 of the Constitution of the State of Texas provides:

> "Every person, corporation, or company, that may commit a homicide, through a willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be . . ."

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2. 734 F.2d 1036.

In *Heil Co. v. Grant,* 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler, 1976, writ ref'd n.r.e.), the Texas Appellate Court stated that it believed that exemplary damages may be recovered under Article 16, Sec. 26 of the Constitution of the State of Texas, in a Strict Liability Action for the death of the user of a defective product. (Appendix A-8 of Petition); see also, *Maxey v. Freightliner Corp.,* 665 F.2d 1367, 1371-72, & n. 4 (5th Cir. 1982).

As set forth in the HANSEN opinion, the Fifth Circuit states that in the case of *Maxey v. Freightliner Corp.,* supra, the Circuit was presented with the argument that, as a matter of law, punitive damages were not available in Products Liability cases in Texas. Noting the language in *Heil,* supra, the Fifth Circuit stated:

> "Absent some reason to believe that the Texas Courts, when presented with the question, will erect such a Bar to recovery of exemplary damages, which otherwise are guaranteed by the Texas Constitution, this Court is reluctant to do so."[3]

As was further pointed out by the Fifth Circuit in the HANSEN opinion, that, in addition to the Texas Constitutional provision, there is another factor which distinguishes *Jackson* and Mississippi Law from the present case and Texas law. *Jackson,* did not involve an action for wrongful death, but was instead an action for personal injury. As observed by the Fifth Circuit, the Texas Supreme Court has yet to address the issue, however, at least one (1) Appellate Court has upheld an award of Punitive damages in a Products Liability action for personal injury which did not involve wrongful death,

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3. Appendix A-8 of Petition, n. 7; (see also, Maxey v. Freightliner Corp., supra, at 1317 n. 4)

citing, *Rawlings Sporting Goods Co. v. Daniels,* 619 S.W.2d 435 (Tex. Civ. App.—Waco, 1981, writ ref'd n.r.e.), and thus, as further set forth by the Fifth Circuit, there is some suggestion that the Texas Courts may allow punitive damages in Products Liability actions even in cases not covered by Article 16, Sec. 26.[4]

Thus, the Fifth Circuit correctly observed that the only suggestion from the Texas Court is that there is, indeed, such a right to punitive damages in Strict Liability actions for the death of a user of a defective product, and that absent a clear indication from the Texas Courts to the contrary, the Fifth Circuit was Erie-bound[5] not to dictate otherwise, and accordingly, found no basis upon which to hold that Texas Courts would disallow punitive damages in a case such as this.[6]

Although Congress has given some consideration to Product Liability Litigation in general, and with the concerns of asbestos injuries in particular,[7] it has not decided what solution, if any, is called for. There is no further policy in this area that justifies a Federal Court in a diversity action defining what are the elements of compensatory damages or whether punitive damages should be available.

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4. Appendix A-9 of Petition, n. 8.

5. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

6. Appendix A-9 of Petition.

7. Product Liability Act, S. 44, 98th Cong., 1st Sess. (1983), hearings before the Subcommittee on the Consumer, Senate Commerce Committee, 98th Cong., 2nd Sess. (1984); Occupational Disease Compensation Act of 1983, H.R. 3175, 98th Cong., 1st Sess. (1983), hearings before the Subcommittee on Labor Standards, House Education & Labor Committee, 98th Cong., 1st Sess. (1983); Asbestos Workers Recovery Act of 1984, S. 2708, 98th Cong., 2d Sess. (1984).

Neither is this a case in which unique Federal interests are involved. This is an action between private parties, in which no Federal interests have been claimed or adverse impact on federally related rights have been shown. *Bank of Am. Nat'l T. & S. Ass'n. v. Parnell,* 352 U.S. 29 (1956). This is strictly a diversity action with no federal question raised on Appeal. It is thus a case which should unquestionably be governed by State law. *Miree v. DeKalb County,* 433 U.S. 25, 28 (1977).

In the absence of some Federal interest which has not been claimed or shown to exist, this matter is within parameters of *Erie* and Federal Court must apply State law. *Texas Ind., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981); *City of Milwaukee v. Illinois,* 451 U.S. 304 (1981); *Northeast Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO,* 451 U.S. 77 (1981).

As pointed out in the Fifth Circuit opinion, JOHNS-MANVILLE contends that the award of Punitive damages in Mass Tort Cases is unconstitutional because punitive damages are analogous to criminal penalties. JOHNS-MANVILLE argued that the Constitution requires assurance against multiple, unrestrained, punishments in the form of punitive damages, and that it is being subjected to double jeopardy, and is being deprived of property without due process, and is subjected to "overkill" by repeated punitive damage awards which will lead to its demise. Thus, JOHNS-MANVILLE urges that punitive damages should not be awarded against a company that faces a multitude of Product Liability actions, for if punitive damages are awarded in many of these actions, JOHNS-MANVILLE argues that it will not be punished, but destroyed.

Much of the impetus for the viewpoint of JOHNS-MANVILLE is traceable to Judge Friendly's opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). In *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (1982), the Sixth Circuit Court of Appeals observed that however eloquent the essay, it is confessed dictum. The Sixth Circuit went on to state that Judge Friendly noted that the New York cases afford no basis for predicting that the New York Court of Appeals would adopt a rule disallowing punitive damages in a case such as this, and that the *Erie* doctrine wisely prevents the Sixth Circuit in engaging in such extensive law-making on local Tort Liability, a subject which the people of New York have entrusted to their Legislature and, within limits to their own Courts, and not to the Appellate Courts. The Sixth Circuit continued in stating that the relief sought by JOHNS-MANVILLE may be more properly granted by the State or Federal legislature than by the Sixth Circuit itself, and the fact, that such legislative relief was being considered by Asbestos-product manufacturers. (*Moran*, at p. 817; see also, 68 A.B.A.J. 398 (April 1982); *New York Times*, August 10, 1982, at 34).

The Fifth Amendment guarantee against double jeopardy, applicable to the States through the Fourteenth Amendment, protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1968). However, the jeopardy to which the Fifth Amendment refers is not present in proceedings that are not "essentially criminal". *Breed v. Jones*, 421 U.S. 519, 528 (1974).[8]

As pointed out by the Fifth Circuit, no cases have been uncovered, and JOHNS-MANVILLE has pointed

8. See also, Appendix A-10 of Petition.

to none, in which a Court has afforded double jeopardy protection as to any proceeding that was not initiated by the State. Accordingly, it was correctly found that JOHNS-MANVILLE has not been subjected to double jeopardy in violation of the Fourteenth Amendment.

In the case of *Fischer v. Johns-Manville Corp.*, 472 A.2d 577 (N.J. Supr. A.D. 1984) the Court was faced with the same basic argument that JOHNS-MANVILLE asserts herein, including the availability of punitive damages in a Products Liability case tried on Strict Liability principles and punitive damages in Mass Tort Litigation. Reference was made in the *Fischer* opinion to an event of 1976 where there appeared a Law Review Article which argued persuasively in favor of allowing punitive damages in appropriate Products Liability cases, effectively countering the public policy concerns expressed in *Roginsky*, supra. The Law Review Article referred to was Owen, "Punitive Damages In Products Liability Litigation," 74 Mich. L. Rev. 1257 (1976). The *Fischer* Court went on to state that following the publication of Professor Owen's article, the issue has been raised in at least twenty (20) jurisdictions across the country. Virtually all of them, and many in reliance on the Owen article, have found neither a conceptual nor a public policy bar to the allowance of punitive damages in Products Liability actions.[9]

The *Fischer* Court went on to state that they are in full agreement with the observation of the Court in *Neal*

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9. Fischer at 582, for the many, many jurisdictions who have found neither a conceptual nor a public policy bar to the allowance of punitive damages in Products Liability actions, including Texas, Rawlings Sporting Goods Co., Inc. v. Daniels, 619 S.W.2d 435 (Tex. Civ. App.—1981).

v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Penn. 1982), whereby it is stated at p. 378, that:

> ". . . there is no theoretical problem in a Jury finding that a Defendant is liable because of the defectiveness of a product and then judging the conduct of the Defendant in order to determine whether punitive damages should be awarded on the basis of 'outrageous conduct' in light of the injuries sustained by the Plaintiff.
>
> . . . By dispensing with the need to prove fault for purposes of establishing liability under Section 402A (Of Restatement 2d Torts (1965)) the law of Strict Liability does not preclude consideration of 'aggravated fault,' if the Plaintiffs can properly meet their burden of demonstrating sufficient evidence of the Defendant's outrageous conduct."[10]

The Court in *Fischer,* supra, also agreed with the view of the many cases cited therein, that the predication of wholesale insolvency caused by puntive damages awards is much exaggerated (*Fischer,* supra, at 586). The Court concurred, moreover, with the judicial consensus that the legitimate interest of Product-Liability Defendants can be served by careful judicial scrutiny of the adequacy of Plaintiffs' proof regarding outrageous conduct, by monitoring excessive punitive damage awards, and by allowing the introduction into evidence of all pertinent financial circumstances of the Defendant, including its contingent liabilities.

In the case of *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828 (3rd Cir. 1983), there is set forth that the

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10. See also, Acosta v. Honda Motor Co., Ltd., 717 F.2d 828 (3rd Cir. 1983); Piper Aircraft Corp. v. Coulter, 426 So.2d 1108 (Dist. Ct. App. Fla. 1983); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (Sup. Ct. 1980).

Restatement (Second) of Torts does include a generally applicable provision regarding punitive damages. Section 908(2) declares:

> "Punitive damages may be awarded for conduct that is outrageous, because of the Defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the Defendant's act, the nature and extent of the harm to the Plaintiff that the Defendant caused or intended to cause and the wealth of the Defendant." (*Acosta* at 834).

As pointed out by the Court in *Acosta,* supra, nowhere in Section 908(2) of the Restatement, as cited above, or in the comments thereto, did the drafters suggest that these principles should not apply to Strict Products Liability, and the Court in *Acosta* thereby concurred with the considered opinion of the Court of Appeals for the Fifth Circuit that "punishment and deterence, the basis for punitive damages . . . are no less appropriate with respect to a product manufacturer who knowingly ignores safety deficiencies in its product that may endanger human life" than in other cases in which "the Defendant's conduct shows wantonness or recklessness or reckless indifference to the rights of others." (See also, *Dorsey v. Honda Motor Co.,* 655 F.2d 650, 658 (5th Cir. 1981) (construing Florida law), opinion modified on rehearing, 670 F.2d 21 (5th Cir.) cert. denied, ____U.S.____, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982)).

In Texas, punitive damages in a Civil Action are awarded for wanton, reckless, and grossly negligent conduct or conscious indifference to the rights and welfare of others. *Burk Royalty Co. v. Walls,* 616 S.W.2d 911

(Tex. 1981); *Bennett v. Howard,* 141 Tex. 101, 170 S.W.2d 709 (1943); *Sheffield Division, Armco Steel Corp. v. Jones,* 376 S.W.2d 835 (Tex. 1964); *Maxey v. Freightliner Corp.,* 722 F.2d 1238 (5th Cir. 1984).

Texas Courts have permitted an award of punitive damages in product liability suits. *Maxey v. Freightliner Corp.,* 450 F.Supp. 955 (N.D. Tex. 1978), aff'd, 623 F.2d 395 (5th Cir. 1980), *rev'd on other grounds,* 665 F.2d 1367 (5th Cir. 1982) (en banc); *Ford Motor Co. v. Nowak,* 638 S.W.2d 582 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); *Rawlings Sporting Goods Co., Inc. v. Daniels,* 619 S.W.2d 435 (Tex. App.—Waco, 1981, writ ref'd n.r.e.); *Heil Co. v. Grant,* 534 S.W.2d 916 (Tex. App.—Tyler, 1976, writ ref'd n.r.e.).

In *Heil Co. v. Grant,* supra, exemplary damages were recovered under Article 16, Sec. 26, of the Texas Constitution in a Strict Liability action for the death of the user of a defective product. In all the Texas cases where recovery of punitive damages has been allowed or indicated, the elements of malice, actual knowledge, and reckless conduct, have been involved and submitted. (*Heil Co. v. Grant,* supra, *Rawlings Sporting Goods, Inc. v. Daniels,* 619 S.W.2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Ford Motor Co. v. Nowak,* supra).

Thus, regardless of whether the "Products Liability" case is one of negligence, breach of warranty, or "Strict Liability", under Section 402A of the Restatement of Torts (Second), punitive damages may only be awarded in Texas under the Scienter discussed in *Maxey v. Freightliner,* 665 F.2d 1367 (5th Cir. 1982) (en banc), and, of course, with the holdings in *Burk Royalty Co. v. Walls,* 616 S.W.2d 911 (Tex. 1981), *Putnam v. Missouri Valley,*

Inc., 616 S.W.2d 930 (Tex. 1981) and *Alamo National Bank, et al v. Krauss*, 616 S.W.2d 908 (Tex. 1981), when the "Products" case is based upon "gross negligence", and those evidentiary considerations are present, the Court will uphold such award. Cf. *Dorsey v. Honda Motor Co., Ltd.*, supra, at page 657.

The relief that JOHNS-MANVILLE is asking this Court to grant evokes the words of Chief Justice Burger in *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980):

> "The choice we are urged to make is a matter of high policy for resolution within the Legislative process after the kind of investigation, examination, and study that Legislative bodies can provide and Courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the government, the Congress and the Executive, and not to the Courts."

Despite the reliance upon the confessed dicta of Judge Friendly in *Roginsky*, supra, JOHNS-MANVILLE admits that casual dicta is not afforded a great deal of deference. (Cross-Petition, p. 23). JOHNS-MANVILLE also admits that the law to be applied under *Erie* principles is that which the Supreme Court of a State *would apply*, citing, *Comm'r of I.R.S. v. Estate*, 387 U.S. 456, 465, ____S.Ct. ____, ____L.Ed.2d____ (1967) (Emphasis added). JOHNS-MANVILLE further quotes from the Supreme Court opinion of *Comm'r of I.R.S.*, whereby it is set forth that, "while the decree of lower State Courts should be attributed some weight, the decision is not controlling . . . where the Highest Court of the State has not spoken on

the point." (Brief of Cross-Petitioner p. 23). However, JOHNS-MANVILLE conveniently omits the remainder of the passage from the opinion whereby the passage continues ". . . And in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940), this Court further held that "an intermediate Appellate State Court . . . is a datum for ascertaining State law which is not to be disregarded by a Federal Court unless it is convinced by other persuasive data that the Highest Court of the State would decide otherwise.' " (*Comm'r of I.R.S.*, supra, at 1782). Needless to say, JOHNS-MANVILLE has not submitted persuasive authority that the Supreme Court of Texas would decide otherwise, given the authority set forth by HANSEN herein, but has only supplied this Court with phrases taken out of context and half-quotes.

Finally, JOHNS-MANVILLE asserts that the "writ ref'd n.r.e." designations in the writ histories of both *Heil* and *Rawlings* indicates that the Texas Supreme Court was not satisfied that either had correctly declared the law. Again, this argument is misplaced. This same argument was presented in *Rock Island Independent School District v. County Board of School Trustees*, 423 S.W.2d 665 (Tex. Civ. App.—Houston [14th Dist.] 1968), whereby it was contended that such a refusal "no reversible error" did not indicate an outright approval by the Supreme Court of the language of the Courts of Civil Appeals. The Court in *Rock Island Independent School District*, clarified and left no doubt when it stated that:

> "However, such qualification of its refusal of a writ by the Supreme Court does not indicate a disapproval

> of the language of the Courts of Civil Appeal. Furthermore, even such a qualified refusal by the Supreme Court of the Applications for Writ of Error indicates an approval of the results reached by the Courts of Civil Appeals." (*Rock Island* at p. 669).

Given the above, it is clear that the Fifth Circuit was correct in the assessment of applicable law to the determination herein, together with its final assessment that absent a clear indication from the Texas Court to the contrary, the Fifth Circuit was bound by the decision in *Erie* not to dictate otherwise, and having found no basis upon which to hold that Texas Courts would disallow punitive damages in a case as this. (See Appendix A-8, 9 of Petition).

It must be remembered that the causes of actions alleged by HANSEN were based upon Strict Liability for the manufacturer of asbestos-containing insulation, and upon negligence for failure to test and inspect, and for failure to warn. Thus, given the above, it is clear that the Fifth Circuit opinion correctly stated that there is a clear indication from the Texas Courts that punitive damages are guaranteed by the Texas Constitution in Strict Liability actions for the death of a user of a defective product, after having found no basis upon which to hold that Texas Courts would disallow punitive damages in a case as this.

CONCLUSION AND PRAYER

It is clear that this case is brought under Texas law, and Texas law applies to both of the questions involved herein, namely, whether an income tax instruction is

warranted in such a case, and, the applicability of punitive damages in Products Liability actions, containing allegations of negligence.

Texas Courts have consistently held the impact of Federal Income Taxation to be immaterial and inadmissible as the same pertains to damage issues of causes of actions brought under Texas Law and thus the argument of JOHNS-MANVILLE that *Liepelt* is applicable to the present case at Bar is misplaced.

The Court of Appeals did not err in affirming the Trial Court refusal to give the *Liepelt* instruction.

Likewise, JOHNS-MANVILLE'S argument as to the awarding of punitive damages is also misplaced. There is no doubt that under Texas Law, a Plaintiff is entitled to punitive damages upon a showing of gross negligence, i.e., that the Defendant was consciously, knowingly indifferent to the Plaintiff's welfare and safety, and that the Constitution of the State of Texas provides for punitive damages as a result of a willful Act or Omission, or Gross Neglect in favor of surviving spouse or heir.

In the present case at Bar, there is a complete absence of some federal interest and thus the matter is within the parameters of *Erie,* and thus the Fifth Circuit was correct in applying State law because there was no basis upon which to hold that Texas Courts would disallow punitive damages in a case such as this, and JOHNS-MANVILLE has cited none.

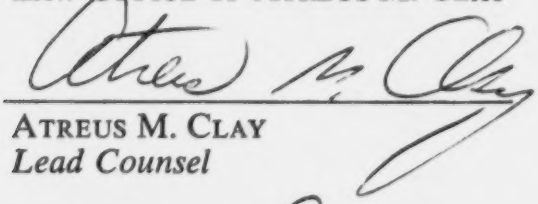
The Fifth Circuit also correctly found that JOHNS-MANVILLE has not been subjected to double jeopardy, nor have they been deprived of due process of law.

It is clear that the Fifth Circuit was correct in the assessment of applicable law to the determination of Punitive damages herein.

WHEREFORE, PREMISES CONSIDERED, Cross-Respondents pray that the Cross-Petition be denied, that the Fifth Circuit's opinion in these regards be, in all things, affirmed.

Respectfully submitted,

LAW OFFICE OF ATREUS M. CLAY



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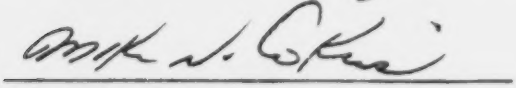
Lead Counsel



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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Reply to Cross-Petition For Writ of Certiorari have been served upon opposing counsel herein by mailing the same to MR. ERVIN A. APFFEL, JR., McLeod, Alexander, et al, P. O. Box 629, Galveston, Texas 77553, by certified mail, return receipt requested, on this the 6 day of February, 1985.

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